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December 21, 2005

VIA ELECTRONIC FILING

Honorable Vernon A. Williams, Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423

Re: *National Solid Wastes Management Association, et al. – Petition for Declaratory Order,*
STB Finance Docket No. 34776

Dear Secretary Williams:

Enclosed for electronic filing is the Response of National Solid Wastes Management Association to New York, Susquehanna, and Western Railway Corporation's Opposition to Petition for Declaratory Order in this matter.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Stephen Richmond", enclosed within a rectangular box.

Stephen M. Richmond

SMR:mjg

Attachment

cc: Service list

16082v1 Boston 012346

Beveridge & Diamond, P.C.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 34776

**RESPONSE OF NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION
TO NEW YORK, SUSQUEHANNA, AND WESTERN RAILWAY CORPORATION'S
OPPOSITION TO PETITION FOR DECLARATORY ORDER**

Counsel for National Solid Wastes Management Association

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Marc J. Goldstein, Esq.

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Tel: (781) 416-5700 Fax: (781) 416-5799

Dated: December 21, 2005

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SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 34776

**RESPONSE OF NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION
TO NEW YORK, SUSQUEHANNA, AND WESTERN RAILWAY CORPORATION'S
OPPOSITION TO PETITION FOR DECLARATORY ORDER**

INTRODUCTION

Petitioner, National Solid Wastes Management Association (herein "Petitioner" or "NSWMA"), submits this Response to the Reply of the New York, Susquehanna, and Western Railway Corporation ("NYS&W") in Opposition to Petition of National Solid Wastes Management Association, et al. for Declaratory Order (the "Opposition"). As demonstrated below, NYS&W's arguments that the Petition should be dismissed or stayed are without merit and premised on misstatements, glaring omissions of material facts, and a fundamental misapplication of the law.

PROCEDURAL BACKGROUND

On October 24, 2005, Petitioner and others filed a Petition with the Surface Transportation Board (the "Board") requesting a Declaratory Order concerning the Board's jurisdiction over certain solid waste facilities along rail lines. NYS&W commented in opposition to the petition, and a number of other parties filed comments. On November 23, 2005, the Board issued a Decision allowing 20 additional days for further comments, and 10 days for replies, on the two issues raised by NYS&W's Opposition – that the Petition is moot and the impact of the pending federal District Court action. *See National Solid Wastes*

Management Association, et al., Petition for Declaratory Order, STB Finance Docket No. 34776 (decided November 23, 2005), p. 2. NSWMA files this Reply to respond to the two issues raised by NYS&W.¹

ARGUMENT

I. NYS&W CANNOT MANUFACTURE MOOTNESS BY CLOSING THE 16TH STREET FACILITY IN RESPONSE TO THE PETITION.

NYS&W's argument that the Petition is moot because it has closed the 16th Street facility is without merit. It is settled law that a party cannot manufacture mootness by simply stopping the conduct complained of in a petition or complaint. "Mere voluntary cessation of allegedly illegal conduct does not moot a case; if it did, the courts would be compelled to leave '[t]he defendant ... free to return to his old ways.'" *Deakins v. Monaghan*, 484 U.S. 193, 200 n. 4 (1988) quoting *United States v. Concentrated Phosphate Expert Assn., Inc.*, 393 U.S. 199, 203 (1968) quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953). This is precisely what NYS&W has tried to do here.

Only one week after the docketing of the NSWMA Petition with the Board, NYS&W sent written notice to Rail-Tech, LLC, the operator of the 16th Street facility, that it was terminating Rail-Tech's contract and closing the 16th Street facility effective November 7, 2005. See Letter dated November 4, 2005 from NYS&W to Rail-Tech, attached as Exhibit 2 to the NYS&W Opposition. Moreover, according to Rail-Tech, NYS&W "wrongfully and illegally terminated" Rail-Tech and "on November 7, 2005 NYS&W wrongfully and illegally closed the

¹ While a motion for leave to file a reply does not appear to be necessary due to the November 23, 2005 decision of the Board, in the event the Board determines such a motion is necessary, we would respectfully request that the Board consider this Reply to constitute and include a Motion to Reply to NYS&W's Opposition. As grounds for such request, NSWMA seeks to correct serious factual and legal errors and omissions that underlie NYS&W's Opposition.

facility....” See Letter dated November 11, 2005 from Rail-Tech to the Board, attached hereto as Exhibit 1.

Furthermore, it is unclear whether NYS&W’s representations regarding the status of the 16th Street facility are reliable. In their Reply to the Petition, the New Jersey Meadowlands Commission (“NJMC”) and the New Jersey Department of Environmental Protection (“NJDEP”) were “compelled to point out” that despite a very recent representation to a judge in federal District Court that operations at the 16th Street facility had been suspended, “NJDEP and NJMC have been made aware that operations of that site later resumed for some undetermined period of time.” See Reply of the New Jersey Department of Environmental Protection and New Jersey Meadowlands Commission to Petition of National Solid Wastes Management Association, et al., for Declaratory Order, p. 4, n.4. Indeed, NYS&W’s statements concerning the status of the facility are unsupported by affidavit or other documentary evidence.² If the NJDEP and NJMC accusation is correct, NYS&W had, and continues to have, an affirmative duty to apprise the Board. See 49 CFR § 1103.27(b) and (c).

Moreover, NYS&W’s apparent rapid ability to open and close solid waste processing facilities at its whim invokes a second exception to the mootness doctrine – that the case is capable of repetition, yet evading review. See *Murphy v. Hunt*, 455 U.S. 478, 482 (1982); *Bessemer and Lake Erie Railroad Company*, Petition for Declaratory Order, ICC Docket No. 40220 (decided July 10, 1990), p. 3.

² Even the supplemental filing by NYS&W, captioned as a Response to NJDEP and NJMC, does not clarify this point or provide any supplemental evidence other than to restate the proposition that the facility is closed. See Response of New York, Susquehanna, and Western Railway Corporation to Reply of New Jersey Department of Environmental Protection and New Jersey Meadowlands Commission (dated November 23, 2005), p. 4-5.

First, it is clear that this is a circumstance capable of repetition. NYS&W maintains four other solid waste management facilities along NYS&W rail lines in or near Bergen County, New Jersey that it fails to mention in the Opposition. This omission is curious. NYS&W operated five solid waste facilities in close proximity. It received the Petition, which discussed the facts of one of the facilities as an example and asked for Board action on all similarly situated facilities. NYS&W then shut down the one facility described in the Petition and filed the Opposition with the Board, arguing that the Petition is moot, but did not mention that it has four other similar facilities in close proximity. In addition, given the extremely limited resources necessary to establish one of these facilities – a rail spur and adequate space to deposit and process waste – NYS&W can easily replace the 16th Street facility within days in another location.

Second, if NYS&W's mootness argument is accepted, the Petitioners (and all legitimate regulatory authorities) will play a continual cat-and-mouse game of naming facilities in petitions before the Board, only to have them quickly closed and moved elsewhere. This amounts to an extreme waste of public, private, and Board adjudicatory resources and is the precise problem that the "capable of repetition, yet evading review" doctrine is meant to address.

Under these circumstances, the Petition is not moot and should not be dismissed.

II. THE BOARD SHOULD NOT DISMISS OR STAY THE PETITION BECAUSE OF THE PENDING DISTRICT COURT LITIGATION.

NYS&W argues that the pending action in U.S. District Court for the District of New Jersey, *New York, Susquehanna, and Western Railway Corporation v. Campbell*, Civil Action

No. 05-4010(KSH), makes a declaratory order by the Board inappropriate. This is clearly incorrect.³

The Board has unique and long-standing experience determining the extent of its jurisdiction under the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, 807 (1995) (“ICCTA”). A declaratory order on this issue is critically necessary to inform the public, municipal and state governments, the United States Congress, the courts, and the regulated community, of the Board’s interpretation of its jurisdiction over solid waste facilities.

As recently as March, 2005, the Board recognized that a pending action in District Court does not compel it to surrender jurisdiction on this important subject. In *CSX Transportation, Inc.*, CSX Transportation, Inc. (“CSX”) filed both a petition for a declaratory order with the Board and a lawsuit in the federal District Court. *See CSX Transportation, Inc.*, Petition for Declaratory Order, STB Finance Docket No. 34662 (STB served March 14, 2005) p. 1. Despite a pending motion for preliminary injunction before the District Court and a request by the District of Columbia to the Board to defer to the District Court action, the Board correctly found “the fact that this matter is also pending in the federal district court does not make Board issuance of this decision inappropriate, particularly if it might assist the court.” *Id.* at 6. The Board retained the matter and issued a decision with respect to the scope of preemption. *Id.*; *see also, Joint Petition for Declaratory Order – Boston and Maine Corporation and Town of Ayer, MA*, STB Finance Docket No. 33971 (decided April 30, 2001), p. 2 (Court case stayed and proceedings referred to the Board for decision).

³ While representing CSX Transportation, Inc. (“CSX”) before the Board recently, the *very same lawyers* at Sidley Austin Brown & Wood LLP who now represent NYS&W in this action made the diametrically opposite argument. In *CSX Transportation, Inc.*, these lawyers successfully argued on behalf of CSX that the Board should *not* stay its proceeding due to a pending case in the District Court. In that case, these lawyers used the same arguments made by the Petitioner below. *See* Response of CSX Transportation, Inc. to “Praecept” of the District of Columbia (dated February 22, 2005).

NYS&W's reliance on *Green Mountain Railroad Corp.* is misplaced.⁴ In *Green Mountain*, the District Court had denied a motion to stay its proceedings and refer the matter to the Board and had already rejected the argument that a state permitting statute was entirely preempted by the ICCTA. See *Green Mountain Railroad Corp.*, Petition for Declaratory Order, STB Finance Docket No. 34052 (decided May 24, 2002), p. 3. Under those circumstances, where the District Court had already opined on the issue and had "made clear its desire to resolve the issues raised without referring the matter to the Board," the Board decided not to grant a declaratory order. *Id.* at 4.

However, in this case, neither NSWMA, nor apparently any of the parties to the New Jersey District Court case, seeks referral from the District Court, and the District Court has not ruled on the preemption issue. This is an issue of national significance, and a clear decision by the Board will have impacts throughout the country, independent of the single case pending in District Court on which NYS&W relies. There is a void in Board guidance on this issue, and the pendency of a single case in District Court does not prevent the Board from issuing clarification and guidance. The Board has the expertise, experience, and statutory authority to issue a declaratory order to resolve this controversy as it relates to sites throughout the country, and thereby remove considerable uncertainty. 5 U.S.C. § 554(e); 49 U.S.C. § 721. The Board should not stay this proceeding simply because a District Court case is pending that might address the same or similar issue.

The need for Board action to clarify its position on jurisdiction has recently been underscored in several other proceedings. First, NYS&W has attempted to exploit a lack of

⁴ Indeed, *Green Mountain* is completely distinguished by NYS&W's own lawyers in the *CSX Transportation, Inc.* case in footnote 1 of their Response of CSX Transportation, Inc. to "Praecipe" of the District of Columbia (dated February 22, 2005).

clarity in the scope of the ICCTA preemption in its Answer in *Raritan Baykeeper, Inc. et al. v. Delaware Ostego Corp., et al.*, Civil Action No. 05-4806(DRD), U.S. District Court for the District of New Jersey. In that case, a citizen's suit filed against NYS&W under the federal Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 *et seq.* ("RCRA"), NYS&W asserted as an Affirmative Defense that the ICCTA preempts the application of RCRA at one of its solid waste processing facilities. *See* NYS&W's Answer, attached hereto as Exhibit 2. Consequently, NYS&W is now arguing in one federal District Court case that the ICCTA preempts the application of federal environmental law at a solid waste facility and is arguing in another federal District Court Case that the ICCTA preempts state and local environmental law at its solid waste facilities.

Second, a different company, New England Transrail, LLC, d/b/a/ Wilmington & Woburn Terminal Railway, has just filed a new Petition for Exemption seeking, among other things, to construct and operate a solid waste processing facility in Massachusetts. *See New England Transrail, LLC*, Petition for Declaratory Order, STB Finance Docket No. 34797 (filed December 5, 2005). This petition repeats a filing by New England Transrail that was previously dismissed by the Board because the applicant "has not fulfilled its duty to keep the Board informed of significant changes in the project, and the project appears to be constantly in flux." *See New England Transrail, LLC*, Petition for Declaratory Order, STB Finance Docket No. 34797 (decided May 3, 2005).

Similar fundamental issues of ICCTA preemption exist in the New England Transrail filing as exist in the instant matter. The proponent in New England Transrail previously bobbed and weaved around the preemption issues in an attempt to hide the fact that it planned to process

solid waste on site.⁵ We see similar behavior in the instant case, as NYS&W maneuvers to prevent the Board from addressing the preemption issue directly.

Multiple courts and adjudicatory agencies are now confronted with the same key questions, and all of these cases call out for adequate guidance from the Board. We respectfully submit that the Board has an obligation to resolve these recurring questions.

III. THE BOARD ROUTINELY DECIDES LEGAL ISSUES CONCERNING “SIMILARLY SITUATED” FACILITIES.

NYS&W argues that the Petition’s inclusion of all “similarly situated” facilities violates the Board’s practice of conducting a “case-by-case, fact-specific” analysis. *See* Opposition, pp. 2, 9-10, quoting *Hi Tech Trans, LLC*, Petition for Declaratory Order, STB Finance Docket No. 34192 (STB served Aug. 14, 2003). This, too, is without merit. It is undisputed that the Board’s decisions regarding preemption of particular activities have wide-ranging impacts beyond the immediate cases before the Board. Indeed, counsel for NYS&W admitted as much on behalf of CSX in the recent *CSX Transportation* case. “[A] declaratory order would have a *precedential effect* that would extend *beyond the District and caution other jurisdictions* considering similar legislation.” CSX Response, p. 3 (emphasis added). Implicitly, each ruling by the Board reaches similarly situated facilities or regulations throughout the country.

At its core, NYS&W confuses the legal issue presented in the Petition with a fact-based determination of whether a particular facility is preempted. Here, Petitioner presents a legal question – whether regulation of solid waste facilities along rail lines is preempted by the ICCTA. Once this legal issue is resolved, the Board’s “case-by-case and fact-specific

⁵ The Board found in dismissing that petition: “In supplemental information provided to SEA and the Massachusetts Department of Environmental Protection (MADEP) following issuance of the EA, NET for the first time indicated that it plans to engage in certain solid waste and construction waste processing activities...”. *Id.*, at 2.

determination” should be employed to decide whether a *particular* solid waste facility falls within the legal rule defined by the Board. Moreover, given the cat-and-mouse game of closing challenged facilities in which NYS&W appears to be engaged, any prohibition against the Board issuing a rule more broadly applicable to solid waste facilities along rail lines would unreasonably restrict the Board’s ability to exercise its authority to resolve controversies and remove uncertainty pursuant to 5 U.S.C. § 554(e) and 49 U.S.C. § 721.

CONCLUSION

For all of the foregoing reasons, as well as the reasons contained in the Petition, Petitioner respectfully requests that the Board institute a proceeding as requested in the Petition and ultimately issue a Declaratory Order confirming either that:

- (1) the solid waste facility located at the 16th Street facility, and any similarly situated facility, is not within the exclusive jurisdiction of the Board because the solid waste management and processing operations conducted at the facility are not integrally related to the provision of rail transportation, and state and local solid waste laws are therefore not preempted by the ICCTA, 49 U.S.C. § 10501(b), as they apply to the solid waste activities at the facility and at similarly situated locations; or
- (2) the contracted operation of the facility, or of any similarly situated location, to a company that engages in solid waste management activity does not constitute transportation by rail carrier, and (ii) state and local solid waste laws are therefore not preempted by Section 102(a) of the ICCTA, 49 U.S.C. § 10501(b) at the facility.

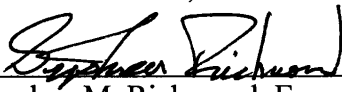
DATED: Wellesley, Massachusetts
December 21, 2005

Respectfully submitted,

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION

By its Attorneys,

BEVERIDGE & DIAMOND, P.C.

By: 
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David Biderman, Esq., General Counsel
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MANAGEMENT ASSOCIATION
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Washington, D.C. 20008

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of December, 2005, I served the foregoing Response of National Solid Wastes Management Association to NYS&W's Opposition to Petition For Declaratory Order by causing a copy to be delivered by first class mail, postage prepaid, to:

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Martin T. Durkin, Esq.
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Ridgefield Park, NJ 07660

Mayor Patrick J. Byrne
Hainesport Township, New Jersey
Hainesport Township Municipal Complex
One Hainesport Centre
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George Marinakis, P.E.
Cape May County Municipal Utilities
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The Honorable James R. Miceli
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Boston, MA 02133-1054

Robert Orlin
New York City Department Of Sanitation
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Office of the Attorney General
Environmental Protection Division
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The Honorable Robert Menendez
U S House Of Representatives
Washington, DC 20515

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Robert Isner
State Of Connecticut Department Of
Environmental Protection
79 Elm Street
Hartford, CT 06106-5127



Mard J. Goldstein

Exhibit 1

RailTech, LLC November 11, 2005 Letter

Law Offices Of
DONALD HOROWITZ
24 Bergen Street
Hackensack, New Jersey 07601-5487

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(201) 343-3321 Fax
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Of Counsel
KELLY BERTON ROCCO

DONALD HOROWITZ*
Certified by the Supreme Court of New Jersey
As a Civil & Criminal Trial Attorney
JILL HOROWITZ*

*Member of the NJ and NY Bars

November 11, 2005

Surface Transportation Board
1925 K Street, NW
Washington, D.C. 20423-0001

FD 34776



**Re: National Solid Wastes Management Association, et al.
Petition for Declaratory Order**

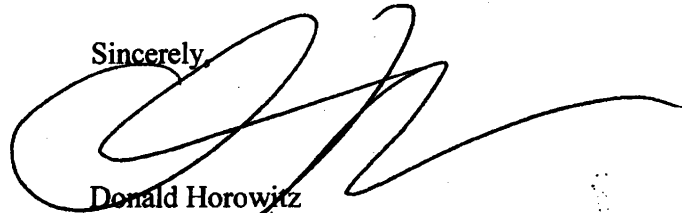
Dear Sir/Madame:

We represent Rail-Tech, L.L.C., a limited liability company of the State of New Jersey ("Rail-Tech"), which has been served with a Petition Of National Solid Wastes Management Association, et al. For Declaratory Order dated October 24, 2005 ("Petition"). The Petition is moot, for the reason that on November 4, 2005 The New York, Susquehanna and Western Railway Corporation, a New Jersey corporation ("NYS&W"), wrongfully and illegally terminated Rail-Tech's Rail Transportation Contract with NYS&W dated June 2, 2005, and thereafter on November 7, 2005 NYS&W wrongfully and illegally closed the facility referred to in the Petition, and, wrongfully and illegally refused to permit Rail-Tech to retrieve its personalty located at the Site referred to in the Petition.

While Rail-Tech clearly has valid causes of action for compensatory and punitive damages against NYS&W, they are not within the jurisdiction of this Board. Thus, the Petition is moot and should be dismissed by this Board.

We are submitting the executed original and 11 copies of this letter. Please return one copy with the filing data stamped thereon to us in the enclosed self addressed, stamped envelope.

Sincerely,



Donald Horowitz

DH/lmg
Enclosure

c: G. Paul Moates, Esq.
John A. McKinney, Jr., Esq.
Kevin P. Auerbacher, Esq.
Carter H. Strickland, Jr., Esq.
Rail-Tech, L.L.C.

ENTERED
Office of Proceedings

NOV 17 2005

Part of
Public Record

Exhibit 2

NYS&W's Answer
in *Raritan Baykeeper, Inc. et al. v. Delaware Ostego Corp., et al.*

WOLFF & SAMSON PC

The Offices At Crystal Lake

One Boland Drive

West Orange, New Jersey 07052-3698

973-530-2036

Counsel for Defendants The New York, Susquehanna and Western
Railway Corporation, improperly plead as NYS&W Railway Corporation, and Delaware Ostego
Corp.

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

RARITAN BAYKEEPER, INC.,
HACKENSACK RIVERKEEPER, INC.,
MR. ANDREW WILLNER and MR.
WILLIAM SHEEHAN

Plaintiff,

v.

DELAWARE OSTEGO CORP., NYS&W
RAILWAY CORP., MILLENNIUM
RESOURCE RECOVERY, LTD.,
CROSSROADS RECYCLING, INC.,
RAILTECH, L.L.C., ONTRACK LOADING
COMPANY, INC., CARDELLA
TRUCKING CO., INC. and CARDELLA
WASTE SERVICES OF NEW JERSEY,
INC.,

Defendants.

Civil Action No. 05-4806 (DRD)
ELECTRONICALLY FILED

**ANSWER TO COMPLAINT ON
BEHALF OF DEFENDANTS THE NEW
YORK, SUSQUEHANNA AND
WESTERN RAILWAY CORPORATION
AND DELAWARE OSTEGO CORP.**

Defendants The New York, Susquehanna and Western Railway Corporation (individually
“NYS&W”) and Delaware Ostego Corp. (individually, “DOC” and collectively with NYS&W,
“Defendants”) by and through their attorneys Wolff & Samson PC and Sidley Austin Brown and
Wood, LLP, hereby respond to the Complaint as follows:

1. Defendants provide no response to the allegations contained in Paragraph 1 of the
Complaint inasmuch as they state legal conclusions. To the extent that these allegations are

construed not to state legal conclusions, or are otherwise deemed to require a response, Defendants deny these allegations.

JURISDICTION AND VENUE

2. Railroad denies the allegations contained in Paragraph 2 of the Complaint. This Court lacks jurisdiction over the subject matter of the Complaint because, among other reasons, the Plaintiffs (including both the organizational and individual plaintiffs) lack standing to bring the claims asserted in the Complaint.

3. With respect to the allegations contained in Paragraph 3 of the Complaint, Defendants are without knowledge or information sufficient to form a belief as to the truth of Plaintiffs' intent. Defendants admit that they did receive a letter from Plaintiffs regarding this matter, but deny all remaining allegations contained in Paragraph 3.

4. Defendants admit that more than 60 days have passed since they received the letter referred to in Paragraph 3 of the Complaint, but deny all remaining allegations contained in Paragraph 4.

5. Defendants deny the allegations contained in Paragraph 5 of the Complaint. The New Jersey Department of Environmental Protection ("NJDEP"), through Commissioner Bradley Campbell, has commenced a diligent prosecution to redress the violations alleged by Plaintiffs in the Complaint in an action before the United States District Court for the District of New Jersey entitled, New York Susquehanna & Western Railway Corporation v. Campbell et al., Civil Action No. 05-4010 (KSH).

6. With respect to Paragraph 6 of the Complaint, Defendants deny that they have committed any violations of RCRA, deny that they own or operate "open dumps" and deny all remaining allegations contained in Paragraph 6.

7. Defendants deny the allegation contained in Paragraph 7 of the Complaint inasmuch as Defendants deny that they are committing any "violations" at the locations referred to in the Complaint.

PARTIES

8. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 8 of the Complaint.

9. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 9 of the Complaint.

10. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 10 of the Complaint.

11. Defendants deny that any conduct, action, or activity in which they engage causes any impact on the "immediate environment," or creates any "associated health risks" that reduce or diminish Plaintiffs' use or enjoyment of the Hackensack River, "surrounding uplands or wetlands," or the "area." Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 11 of the Complaint..

12. Defendants deny the allegations contained in Paragraph 12 of the Complaint.

13. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 13 of the Complaint.

14. Defendants deny the allegations contained in Paragraph 14 of the Complaint.

15. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 15 of the Complaint.

16. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 16 of the Complaint.

17. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 17 of the Complaint.

18. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 18 of the Complaint.

19. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 19 of the Complaint.

20. Defendants deny the allegations contained in Paragraph 20 of the Complaint.

21. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 21 of the Complaint.

22. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 22 of the Complaint.

23. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 23 of the Complaint.

24. Defendants deny the allegations contained in Paragraph 24 of the Complaint.

25. Defendants admit the allegations contained in Paragraph 25 of the Complaint.

26. Defendants admit that the NYS&W is a wholly-owned subsidiary of Delaware Ostego Corp., and that it is a corporation formed under the laws of the State of New Jersey with its main business address at One Defendants Avenue, Cooperstown, NY, and that it operates over 400 miles of track in New York, New Jersey and Pennsylvania. Defendants deny all other allegations of Paragraph 26 of the Complaint.

27. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 27 of the Complaint.

28. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 28 of the Complaint.

29. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 29 of the Complaint.

30. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 30 of the Complaint.

31. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 31 of the Complaint.

32. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 32 of the Complaint.

33. Defendants deny the allegation contained in Paragraph 33 of the Complaint.

34. Defendants deny the allegations contained in Paragraph 34 of the Complaint.

FACTS COMMON TO ALL CLAIMS

35. Defendants admit that the NYS&W presently operates transloading facilities that handle construction and demolition materials near 43rd Street, Secaucus Road, and 94th Street in North Bergen, New Jersey. Defendants deny the remaining allegations of Paragraph 35 of the Complaint.

36. With respect to the allegations contained in Paragraph 36 of the Complaint, Defendants admit that the NYS&W owns and operates the 5800 West Side Avenue Facility (incorrectly referred to in the Complaint as “Westside”) and that the 5800 West Side Avenue Facility “operates somewhat differently from the others,” but deny all remaining allegations contained in Paragraph 36.

37. Defendants deny the allegations in Paragraph 37 of the Complaint in that Paragraphs 37 – 62 do not accurately portray the present operations at the listed facilities. Defendants respond to the allegations contained in Paragraphs 37 – 62 of the Complaint below.

38. Defendants admit that the 43rd Street, 94th Street and 2480 Secaucus Road Facilities receive “construction and demolition material from commercial properties and construction sites”. To the extent Paragraph 38 of the Complaint, or any other provision of the

Complaint, alleges that its characterization of materials at issue as “solid waste” gives rise to any legal responsibilities or liability on the part of Defendants under RCRA or any other law, Defendants deny that allegation. Defendants further deny that they have violated applicable law with regard to the materials at issue, and deny all remaining allegations contained in Paragraph 38.

39. Defendants admit that the 43rd Street, 94th Street and 2480 Secaucus Road Facilities receive construction and demolition materials, including the types of material listed in Paragraph 39 of the Complaint. To the extent Paragraph 38 of the Complaint, or any other provision of the Complaint, alleges that its characterization of materials at issue as “solid waste” gives rise to any legal responsibilities or liability on the part of Defendants under RCRA or any other law, Defendants deny that allegation. Defendants further deny that they have violated applicable law with regard to the materials at issue, and deny all remaining allegations contained in Paragraph 39.

40. Defendants admit that the 43rd Street, 94th Street and 2480 Secaucus Road Facilities receive of the types described in Paragraph 40 of the Complaint. However, Defendants deny that the characterization of the materials at issue as “solid waste” gives rise to any legal responsibilities on the part of Defendants. Defendants further deny that they have violated applicable law with regard to the materials at issue. Additionally, Defendants deny that the materials brought to these sites are “tipped [] onto the ground” and deny all remaining allegations contained in Paragraph 40.

41. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 41 of the Complaint.

42. Defendants admit the allegations contained in Paragraph 42 of the Complaint, but deny any allegation that they were or are required to obtain approvals for the siting, design and construction of the 16th Street, 43rd Street, 94th Street and 2480 Secaucus Road Facilities.

43. Defendants admit the allegations contained in Paragraph 43 of the Complaint, but deny any allegation that they were or are required to obtain permits to operate “solid waste facilities” at the sites in question.

44. Defendants admit that, as of the date of this Answer, there are not roofs on the facilities referenced in Paragraph 44 of the Complaint. Defendants deny that they were or are legally obligated to enclose or construct roofs over the operations conducted at the facilities referred to in the Complaint. Defendants deny all remaining allegations contained in Paragraph 44.

45. Defendants deny the allegations contained in Paragraph 45 of the Complaint, because the unloading area at the 16th Street Facility is bounded on two sides by stacked concrete blocks and stacked intermodal containers and partially bound on a third side by concrete blocks; that the unloading area at the 43rd Street Facility consists of metal containers on three sides with an additional metal wall attached to the top of the containers on two sides, and that the unloading area at the 2480 Secaucus Road Facility consists of metal containers stacked two high on three sides with no roof. Defendants deny all remaining allegations contained in Paragraph 45.

46. Defendants deny the allegations contained in Paragraph 46 of the Complaint with respect to the 94th Street Facility and the 2480 Secaucus Road Facility. Defendants admit that the walls at the other facilities are not “watertight,” but deny remaining allegations contained in Paragraph 46 of the Complaint, but deny any allegation that they were or are required to ensure

that the walls surrounding the “tipping” surfaces at the sites in question are “watertight.” Defendants deny all remaining allegations contained in Paragraph 46.

47. Defendants admit the allegation contained in Paragraph 47 of the Complaint that the “tipping surfaces” at the 16th Street, 43rd Street, 94th Street and 2480 Secaucus Road Facilities are open on at least one side, but deny any allegation that they were or are required to completely enclose the “tipping surfaces” at the sites in question. Defendants deny all remaining allegations contained in Paragraph 47.

48. Defendants admit the allegation contained in Paragraph 48 of the Complaint that the 16th Street, 43rd Street, 94th Street and 2480 Secaucus Road Facilities do not have leachate collection and treatment systems, but deny any allegation that they were or are required to install leachate collection and treatment systems at the sites in question. Defendants deny all remaining allegations contained in Paragraph 48.

49. Defendants admit the allegations contained in Paragraph 49 of the Complaint that the 16th Street, 43rd Street, 94th Street and 2480 Secaucus Road Facilities regularly utilize water from hoses to control dust emissions, but deny any allegation that they were or are required to install a state of the art dust-control system at the Facilities. Defendants deny all remaining allegations contained in Paragraph 49.

50. Defendants deny the allegations contained in Paragraph 50 of the Complaint.

51. Defendants deny the allegations contained in Paragraph 51 of the Complaint.

52. Defendants deny the allegations contained in Paragraph 52 of the Complaint.

53. With respect to the allegations contained in Paragraph 53 of the Complaint, Defendants admit that non-conforming material that are not allowed by the destination landfills may be removed prior to loading conforming construction and demolition material onto railcars at the transloading facilities at issue.

54. With respect to the allegations contained in Paragraph 54 of the Complaint, Defendants admit that a tub grinding machine may have been tested at the 16th Street Facility, but states that this was an isolated occurrence. Defendants further respond that the facility at 16th Street in North Bergen, N.J. has been permanently closed and has ceased operations.

55. Defendants lack sufficient information to admit or deny the allegations contained in Paragraph 55 of the Complaint, because the term “removed, rejected, and segregated materials” is not explained or defined. To the extent Paragraph 55 refers to non-conforming material that may be included in the material deposited at the transload facilities by shippers, Defendants incorporate by reference their response to Complaint Paragraph 52. Defendants are without knowledge or information as to the disposal practices employed by the shippers with respect to non-conforming material removed from the Facilities.

56. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 56 of the Complaint.

57. Defendants admit that materials are transloaded from the “tipping” floors of the Facilities to railcars for rail line haul transportation and disposal, but deny the remaining allegations contained at Paragraph 57 of the Complaint.

58. Defendants admit that materials are transloaded from the “tipping” floors of the Facilities to railcars for rail line haul transportation and disposal, but deny the remaining allegations contained at Paragraph 58 of the Complaint. .

59. Defendants admit that a mesh netting covers the materials in the railcars, but deny the remaining allegations contained in Paragraph 59 of the Complaint.

60. Defendants deny the allegations of Paragraph 60 of the Complaint.

61. Defendants deny the allegations of Paragraph 61 of the Complaint.

62. Defendants deny the allegations of Paragraph 62 of the Complaint.

STATUTORY AND REGULATORY FRAMEWORK

63. Defendants provide no response to the allegations contained in Paragraph 63 of the Complaint inasmuch as they state legal conclusions. To the extent these allegations are construed not to state legal conclusions, or otherwise require a response, Defendants deny these allegations.

64. Defendants provide no response to the allegations contained in Paragraph 64 of the Complaint inasmuch as they state legal conclusions. To the extent these allegations are construed not to state legal conclusions, or otherwise require a response, Defendants deny these allegations.

65. Defendants provide no response to the allegations contained in Paragraph 65 of the Complaint inasmuch as they state legal conclusions. To the extent these allegations are construed not to state legal conclusions, or otherwise require a response, Defendants deny these allegations.

66. Defendants provide no response to the allegations contained in Paragraph 66 of the Complaint inasmuch as they state legal conclusions. To the extent these allegations are construed not to state legal conclusions, or otherwise require a response, Defendants deny these allegations.

67. Defendants provide no response to the allegations contained in Paragraph 67 of the Complaint inasmuch as they state legal conclusions. To the extent these allegations are construed not to state legal conclusions, or otherwise require a response, Defendants deny these allegations.

68. Defendants provide no response to the allegations contained in Paragraph 68 of the Complaint inasmuch as they state legal conclusions. To the extent these allegations are construed not to state legal conclusions, or otherwise require a response, Defendants deny these allegations.

69. Defendants provide no response to the allegations contained in Paragraph 69 of the Complaint inasmuch as they state legal conclusions. To the extent these allegations are construed not to state legal conclusions, or otherwise require a response, Defendants deny these allegations.

FIRST CLAIM

(RCRA Open Dumping – 16th Street)

70. Defendants repeat and incorporate by reference the answers contained in each of the preceding paragraphs (1 through 69) as if fully set forth at length herein.

71. Defendants admit that NYS&W is the owner of the 16th Street Facility, but deny the remaining allegations contained in Paragraph 71 of the Complaint.

72. With respect to the allegations contained in Paragraph 72 of the Complaint, Defendants admit that NYS&W is the operator of the 16th Street Facility, deny that Rail-Tech LLC is the operator of the 16th Street Facility, and provide no response to the remaining allegation inasmuch as they state a legal conclusion. To the extent these allegations are construed not to state legal conclusions, Defendants deny these allegations.

73. Defendants provide no response to the allegations contained in Paragraph 73 of the Complaint inasmuch as it states a legal conclusion that the construction and demolition (“C&D”) material brought to the 16th Street Facility constitutes “solid waste.” To the extent these allegations are construed not to state legal conclusions, or otherwise require a response, Defendants deny these allegations.

74. Defendants admit that electric wires run over a portion of the 16th Street property, but deny the remaining allegations of Paragraph 74 of the Complaint.

75. Defendants provide no response to the allegations contained in Paragraph 75 of the Complaint inasmuch as they state legal conclusions that the 16th Street Facility is not a “sanitary landfill” or a “facility for disposal of hazardous waste.” To the extent these allegations are construed not to state legal conclusions, Defendants deny these allegations.

76. Defendants deny the allegations contained in Paragraph 76 of the Complaint.

77. Defendants deny the allegations contained in Paragraph 77 of the Complaint.

78. Defendants deny the allegations contained in Paragraph 78 of the Complaint.

SECOND CLAIM

(RCRA Open Dumping – 43rd Street)

79. Defendants repeat and incorporate by reference the answers contained in each of the preceding paragraphs (1 through 78) as if fully set forth at length herein.

80. Defendants admit the allegations contained in Paragraph 80 of the Complaint that NYS&W is the owner of the 43rd Street Facility, deny the remaining allegations.

81. Defendants admit that the allegations contained in Paragraph 81 of the Complaint that NYS&W is the operator of the 43rd Street Facility, deny the allegations that Ontrack or Cardella operates the 43rd Street Facility, but provides no response to the remaining allegations inasmuch as they state a legal conclusion. To the extent these allegations are construed not to state legal conclusions, Defendants deny these allegations.

82. Defendants provide no response to the allegations contained in Paragraph 82 of the Complaint inasmuch as they state a legal conclusion that the C&D material brought to the 43rd Street Facility constitutes “solid waste.” To the extent these allegations are construed not to state legal conclusions, Defendants deny these allegations.

83. Defendants provide no response to the allegations contained in Paragraph 83 of the Complaint, inasmuch as they state legal conclusions that the 43rd Street Facility is not a “sanitary landfill” or a “facility for disposal of hazardous waste.” To the extent these allegations are construed not to state legal conclusions, Defendants deny these allegations.

84. Defendants deny the allegations contained in Paragraph 84 of the Complaint.

85. Defendants deny the allegations contained in Paragraph 85 of the Complaint.

86. Defendants deny the allegations contained in Paragraph 86 of the Complaint.

THIRD CLAIM

(RCRA Open Dumping – 94th Street)

87. Defendants repeat and incorporate by reference the answers contained in each of the preceding paragraphs (1 through 86) as if fully set forth at length herein.

88. Upon information and believe, Defendants admit that “Millennium” is the owner of real property at our about 94th Street in North Bergen, NJ, but is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations.

89. Defendants admit that they lease real property at or about 94th Street in North Bergen, New Jersey, but deny the remaining allegations contained in Paragraph 89 of the Complaint.

90. Defendants admit the allegations contained in Paragraph 90 of the Complaint that NYS&W operates the 94th Street Facility, deny the allegations that Millennium or Crossroads operates the 94th Street Facility, and provide no response to the remaining allegations inasmuch as they state a legal conclusion. To the extent these allegations are construed not to state legal conclusions, Defendants deny these allegations.

91. Defendants deny that the Complaint’s characterization of the materials at issue as “solid waste” gives rise to any legal responsibilities on the part of Defendants. Defendants

further deny that it has violated applicable law with regard to the materials at issue. Defendants provide no response to the remaining allegations contained in Paragraph 91 because they state a legal conclusion. To the extent these allegations are construed not to state legal conclusions, Defendants deny these allegations.

92. Defendants provide no response to the allegations contained in Paragraph 92 of the Complaint, inasmuch as they state legal conclusions that the 94th Street Facility is not a “sanitary landfill” or a “facility for disposal of hazardous waste.” To the extent these allegations are construed not to state legal conclusions, Defendants deny these allegations.

93. Defendants deny the allegations contained in Paragraph 93 of the Complaint.

94. Defendants deny the allegations contained in Paragraph 94 of the Complaint.

95. Defendants deny the allegations contained in Paragraph 95 of the Complaint.

FOURTH CLAIM

(RCRA Open Dumping – 2480 Secaucus Road)

96. Defendants repeat and incorporate by reference the answers contained in each of the preceding paragraphs (1 through 95) as if fully set forth at length herein.

97. Defendants admit that NYS&W owns real property at or about 2480 Secaucus Road in North Bergen, New Jersey. Defendants also admit that that NYS&W operates a transloading facility at or about 2480 Secaucus Road in North Bergen, New Jersey. Defendants provide no response the remaining allegations of Paragraph 97 inasmuch as they state a legal

conclusion. To the extent these allegations are construed not to state legal conclusions, Defendants deny these allegations.

98. Defendants deny that the Complaint's characterization of the materials at issue as "solid waste" gives rise to any legal responsibilities on the part of Defendants. Defendants further deny that it has violated applicable law with regard to the materials at issue.

99. Defendants provide no response to the allegations contained in Paragraph 99 of the Complaint, inasmuch as they state legal conclusions that the 2480 Secaucus Road Facility is not a "sanitary landfill" or a "facility for disposal of hazardous waste." To the extent these allegations are construed not to state legal conclusions, Defendants deny these allegations.

100. Defendants deny the allegations contained in Paragraph 100 of the Complaint.

101. Defendants deny the allegations contained in Paragraph 101 of the Complaint.

102. Defendants deny the allegations contained in Paragraph 102 of the Complaint.

FIFTH CLAIM

(RCRA Open Dumping – 5800 West Side Avenue)

103. Defendants repeat and incorporate by reference the answers contained in each of the preceding paragraphs (1 through 102) as if fully set forth at length herein.

104. Defendants admit the allegations contained in Paragraph 104 of the Complaint that they own and operate the 5800 West Side Facility, but provides no response to the remaining allegations inasmuch as they state a legal conclusion. To the extent these allegations are construed not to state legal conclusions, Defendants deny these allegations.

105. With respect to the allegations contained in Paragraph 105 of the Complaint, Defendants deny that the characterization of the materials at issue as “solid waste” gives rise to any legal responsibilities on the part of Defendants. Defendants further deny that it has violated applicable law with regard to the materials at issue.

106. Defendants admit that they have not received an operating permit for the 5800 West Side Avenue Facility from EPA, NJDEP, or the New Jersey Meadowlands Commission but deny any allegations that they were or are required to obtain an operating permit for the 5800 West Side Avenue Facility. Defendants deny the remaining allegations of Paragraph 106 of the Complaint.

107. Defendants provide no response to the allegations contained in Paragraph 107 of the Complaint inasmuch as they state legal conclusions that the 5800 West Side Avenue Facility is not a “sanitary landfill” or a “facility for disposal of hazardous waste.” To the extent these allegations are construed not to state legal conclusions, Defendants deny these allegations.

108. Defendants admit that they have not received approval of the design and construction of the 5800 West Side Avenue Facility from EPA, NJDEP, or the New Jersey Meadowlands Commission but deny any allegations that it was or is required to obtain such approval for the 5800 West Side Avenue Facility. Defendants deny the remaining allegations of Paragraph 108 of the Complaint.

109. Defendants deny the allegations contained in Paragraph 109 of the Complaint.

110. Defendants deny the allegations contained in Paragraph 110 of the Complaint.

111. Defendants deny the allegations contained in Paragraph 111 of the Complaint.

112. Defendants deny the allegations contained in Paragraph 112 of the Complaint.

113. Defendants deny the allegations contained in Paragraph 113 of the Complaint.

114. Defendants deny the allegations contained in Paragraph 114 of the Complaint.

RELIEF REQUESTED

To the extent they contain any allegation to which a response is required, Defendants deny all allegations contained in paragraphs (A) through and including (E).

DEFENSES

FIRST DEFENSE

This Court lacks subject matter jurisdiction over the claims asserted in this Complaint because the Plaintiffs lack standing to bring or maintain those claims. *See* U.S. Constitution Article III. Accordingly, this action should be dismissed for lack of subject matter jurisdiction.

SECOND DEFENSE

The Complaint should be dismissed for failure to state a claim upon which relief may be granted, because its claims and allegations are not cognizable under RCRA. Such claims may only be asserted – even by a proper plaintiff – under the Federal Water Pollution Control Act or other federal law and regulations.

THIRD DEFENSE

The First Count of the Complaint is moot and should be dismissed because the facility at 16th Street in North Bergen, N.J. has been permanently closed and has ceased operations.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

The Complaint should be dismissed because Plaintiffs have failed to state a claim upon which relief may be granted.

SECOND AFFIRMATIVE DEFENSE

The Complaint should be dismissed because NJDEP, through Commissioner Bradley Campbell, has commenced a diligent prosecution to redress the violations alleged by Plaintiffs in the Complaint in an action before the United States District Court for the District of New Jersey entitled, New York Susquehanna & Western Railway Corporation v. Campbell et al., Civil Action No. 05-4010 (KSH).

THIRD AFFIRMATIVE DEFENSE

The Complaint should be dismissed because Plaintiffs failed to comply with the notice provisions set forth at 42 U.S.C. §§ 6972(b)(1)(A), (b)(2)(A) and 40 C.F.R. § 254.3.

FOURTH AFFIRMATIVE DEFENSE

The Complaint should be dismissed because this action will be rendered moot when the operations conducted at the Facilities will be performed inside buildings at two sites at the end of 2005.

FIFTH AFFIRMATIVE DEFENSE

The Complaint should be dismissed because Railroad's actions have been in accordance with and/or as required by applicable law at all times relevant to this matter.

SIXTH AFFIRMATIVE DEFENSE

The Complaint should be dismissed because the transloading and short-term storage of materials at the Facilities does not constitute “disposal” under RCRA.

SEVENTH AFFIRMATIVE DEFENSE

The Complaint should be dismissed because Plaintiffs are without standing to prosecute the RCRA claim.

EIGHTH AFFIRMATIVE DEFENSE

The Complaint should be dismissed because as it seeks to apply RCRA, RCRA is displaced and preempted by the Interstate Commerce Act, as amended (including without limitation 49 U.S.C. §§ 10102, 10501).

WOLFF & SAMSON PC
*Attorneys for Defendants The New York,
Defendants & Western Railway
Corporation and Delaware Ostego Corp.*

By: s/John A. McKinney
JOHN A. McKINNEY, JR. (JM-3635)

Dated: November 16, 2005

LOCAL RULE 11.2 CERTIFICATION

The issues, claims and defenses in this matter involve the same or similar subject matter and issues, allegations, claims, counterclaims and third-party claims asserted in the earlier filed action entitled, The New York, Susquehanna and Western Railway Corporation v. Bradley M. Campbell, Robert R. Ceberio, New Jersey Meadowlands Commission, James Anzevino, Michael J. Gonnelli, Leonard R. Kaiser, Mia M. Macri, Eleanore Nissley, Charles A. Ricman and Arlene Walther v. MHF Logistical Solutions, Inc., Slaine Rail Transport, LLC, Precise Construction Contracting, Inc., Rail-Tech, LLC, Hudson National, LLC, Cardella Trucking Co., Inc., Ontrack Loading Company, Inc. Millennium Resource Recovery, LTD, X-Press Rail Transfer, LLC d/b/a/ 94th Street Rail Transfer, LLC, Scott Excavating, LLC, Crossroads Recycling, Inc. and Susquehanna Bulk Systems, Inc., which is pending in this Court under Civil Action No. 05-4010 (KSH).

In addition, Defendant The New York, Susquehanna and Western Railway Corporation ("NYS&W") has filed a request for an adjudicatory hearing and a request for stay regarding Administrative Order and Notice of Civil Administrative Penalty Assessment EA ID# PEA050002-U936 ("AONOCAPA") served by the New Jersey Department of Environmental Protection ("NJDEP") on NYS&W and which relates to the same facilities at issue in this action. More specifically, NYS&W filed a request for adjudicatory hearing and request for stay with the NJDEP on Friday, August 12, 2005. The parties to that administrative proceeding are NYS&W and NJDEP.

s/John A. McKinney
JOHN A. McKINNEY, JR.

Dated: November 16, 2005

CERTIFICATION OF SERVICE

I hereby certify that on this date the within Answer was served on this date via electronic filing with the Clerk of the United States District Court.

s/John A. McKinney
JOHN A. McKINNEY, JR.

Dated: November 16, 2005